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IN THE

Supreme Court of the United States

October Term, 1970

No. 468

PHYLLIS S. DREYFUS and DIANE E. DREYFUS,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Philip S. Dreyfus Trust created under the Will of Moise Dreyfus, Deceased, of August 1, 1935, and known as Trust No. 33705; THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Philip S. Dreyfus Trust dated August 5, 1935 and known as Trust No. 33703; and THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Carolyn S. Dreyfus Trust, dated December 29, 1937, and known as Trust No. 33704; and MICHAEL REESE HOSPITAL AND MEDICAL CENTER, a Not-for-Profit Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT

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No. .....

PHYLLIS S. DREYFUS and DIANE E. DREYFUS,

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vs.

THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Philip S. Dreyfus Trust created under the Will of Moise Dreyfus, Deceased, of August 1, 1935, and known as Trust No. 33705; THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Philip S. Dreyfus Trust dated August 5, 1935 and known as Trust No. 33703; and THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Carolyn S. Dreyfus Trust, dated December 29, 1937, and known as Trust No. 33704; and MICHAEL REESE HOSPITAL AND MEDICAL CENTER, a Not-for-Profit Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT

PHYLLIS S. DREYFUS and DIANE E. DREYFUS pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit rendered April 27, 1970

OPINION BELOW

The opinion of the United States Court of Appeals is not yet printed and is attached hereto as Appendix "A."

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was rendered April 27, 1970. The Petition for Rehearing was denied on May 14, 1970. A copy of the order denying the Petition for Rehearing is appended hereto as Appendix "B."

Jurisdiction of this Court rests on 28 U.S.C.A. 1254

QUESTIONS PRESENTED

The questions presented are:

1. Whether the United States Supreme Court should not make a strong statement against motions for summary judgment in a case showing unconscionable acts?

2. Whether the United States Supreme Court should not re-examine the doctrine of enforcibility of unconscionable acts in federal courts?

3. Is not the enforcement of all unconscionable acts a violation of the Fourteenth Amendment of the United States Constitution?

4. Should the federal court permit an admitted "unconscionable exercise" of a power of appointment under a will of all of $2,500,000.00 in favor of a charity and nothing for the children, where a conscionable construction of the will could result in a favorable result for the children?

5. Should an agreement against public policy be made valid by court acceptance of an affidavit that such an agreement existed?

CONSTITUTIONAL PROVISIONS

Constitution of the United States

* * *

Amendment XIV

"Section 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

There are three trusts involved in these proceedings (Appendix "A" p. 2) having an aggregate value of $2,500,000, each of which was created for the benefit of Philip S. Dreyfus and his lawful issue. On January 19, 1961, Philip died (Appendix "A" p. 2) leaving surviving him as his only lawful issue the petitioner Diane Dreyfus, then 14 years of age, and the petitioner Phyllis S. Dreyfus, then 17 years of age, both residents of the State of California. Philip amended Trust No. 33703, on March 3, 1959 to provide for the minors' support to the date of his death (Appendix "A" p. 2). There was no provision made for their support thereafter.

The first paragraph of the will dated November 18, 1958

provides for the payment of Philip's debts (Appendix "A" p. 3), and the third paragraph bequeaths $1,000 to each of Philip's children, the petitioners herein (Appendix "A" p. 3). The fourth paragraph of the will (Appendix "A" pp. 3 and 4) provides that the rest, residue and remainder of the estate and the exercise of the power of appointment over the trusts in favor of Michael Reese Hospital of Chicago should become effective only "after carrying out the foregoing provisions of this, my Last Will and Testament" (Appendix "A" p. 3).

The record is uncontradicted that on May 31, 1968, the petitioners learned for the first time that Philip's estate was insolvent and their specific bequests of $1,000 each could not be paid (Appendix "A" p. 4). Unpaid to date, and pending more than eight years in the Illinois probate proceedings, is a claim for $150,000.00 filed by the petitioners (Appendix "A" p. 8). Trust No. 33703, inventoried as an asset of the probate estate by the Executor as being subject to the debts, administration expenses and taxes, was distributed to Michael Reese Hospital in accordance with an alleged agreement (Appendix "A" p. 5) with the trustee (not in evidence) that the hospital would assume the duty of paying the obligations of the estate of Philip. Such distribution was made prior to court adjudication.

No trial has been had to date on the merits of petitioners' claims. Three separate cases involving different subject matter have thus far been decided on motions for summary judgment with important triable issues of material fact remaining, two of which cases are cited in the Seventh Circuit's decision (Appendix "A" pp. 6 and 8; Appendix "A" p. 7).

REASONS FOR GRANTING THE WRIT

1. The United States Supreme Court should make a strong statement against motions for summary judgment in a case showing unconscionable acts.

In the case at bar all of the cases involving Phyllis Dreyfus and Diane Dreyfus and Dorris Dreyfus have been decided on motions for summary judgment. *Rosenthal v. First National Bank of Chicago*, 40 Ill.2d 266, 239 N.E.2d 826 (Appendix "A" pp. 6 and 8); *Michael Reese Hospital and Medical Center v. The Mutual Life Insurance Company of N.Y.*, 397 Fed.2d 794, *cert. denied* 89 S.Ct. 400 (Appendix "A" p. 7); and *Dreyfus v. The First National Bank of Chicago*, decided by the United States Circuit Court of Appeals, Seventh Circuit, No. 17474, and not yet reported. Certainly these petitioners, on the state of the record, are entitled to a trial on the merits. Petitioners allege in their complaint, and in the affidavit of Phyllis Dreyfus, that they did not receive the legacy to each of them in the amount of $1,000 under the will of their father, Philip Dreyfus, because his probate estate is insolvent. The respondents do not deny these statements.

After the date of the will (November 18, 1958) Philip Dreyfus executed an instrument in writing, dated March 3, 1959, to provide $200.00 a month for the support of the petitioners (Appendix "A" p. 2). This instrument is in conflict with the provisions of Article Third of his will (Appendix "A" p. 3). There is no proof in the record that the hospital is, in fact, a research organization entitled to take the bequest under Article Fourth of the will (Appendix "A" pp. 3 and 4). There is no evidence in the record that petitioners were living

in California contrary to the provisions of the Divorce Decree (Appendix "A" p. 3).

There is no evidence in the record of an agreement (Appendix "A" p. 5) that the hospital agreed to pay claims, debts and expenses arising out of Philip's probate estate, and there is no evidence that the hospital intended or intends to pay the claim of petitioners filed in 1961 of $150,000 from the assets of the trusts in its possession since 1964.

In *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180, this Court held that controverted allegations of fact could only be resolved by a trial on the merits and not by summary judgment. It has been said that a summary judgment "should never be entered except where the defendant is entitled to its allowance beyond all doubt" *Dulansky v. Iowa-Illinois Gas & Electric Co.* (8 Cir.) 191 Fed 2d 881, 884. We believe that to grant summary judgment where there are grave unconscionable aspects in a case should be strongly condemned by this Court.

2. The United States Supreme Court should void enforcement of unconscionable acts.

It is an appropriate time for such a pronouncement. There are articles of agreement for warranty deed, leases, contracts and will provisions which shock the conscience of federal courts and yet are enforced under the strict provisions of the law. Chief Justice Warren C. Burger in a recent speech said, "Justice is far too important to be left exclusively to the technicians of law." The Fourteenth Amendment of the United States Constitution gives the Court the right of nullifying any law "which shall abridge the privileges and immunities of citizens" and which shall "deny to any person the equal protection

of the laws."

We have not been able to find a case treating of the question of unconscionability on a constitutional basis. This Court has considered the unconscionability of contracts in at least two cases, *Scott v. United States*, 79 U.S. (12 Wall) 443, 445, 20 L.Ed. 438 (1870); and *Hume v. United States*, 132 U.S. 406, 33 L.Ed. 393, 10 S.Ct. 134 (1889). The United States courts of appeal have refused to enforce unconscionable acts upon equitable principles. *Campbell Soup Co. v. Wentz* (3 Cir.) 172 Fed.2d 80, 83 (1948); and *Williams v. Walker-Thomas Furniture Co.*, 350 Fed.2d 445, 121 App.D.C. 315, 18 A.L.R. 3d 1297 (1965).

We believe that this Court should directly determine whether an unconscionable act may abridge the privileges and immunities of citizens and deny to a citizen the equal protection of the laws.

3. Equal protection of the law is not achieved through indiscriminate imposition of inequalities.

Phyllis and Diane Dreyfus have been residents of California since 1955. The trusts were established in Illinois. The amount involved is far in excess of jurisdictional requirements. Generally, the conflict of law rules favors the testator's domicile at the date of death, which was Illinois. However, the federal law supersedes the Illinois rule when dealing with broad constitutional concepts of justice and equal protection under the laws of the United States. *Shelby v. Kraemer*, 334 U.S. 1, 20, 22, 92 L.Ed. 1161, 1184, 1185, 68 S.Ct. 836 (1948); *Jones v. Mayer* (U.S. Supreme Court) 20 L.Ed.2d 1189 (1968); *Truax v. Raich*, 239 U.S. 33, 60 L.Ed. 131, 36 S.Ct. 7 (1915).

This Court said in *Skelby v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948), at page 22:

> "Equal protection of the law is not achieved through indiscriminate imposition of inequalities."

As between a charity and a lineal descendant, the courts should construe a will in favor of the blood line. *Hilton v. Kinsey* (Court of Appeals, District of Columbia) 185 Fed.2d 885, 890 (1950).

4. A federal court should strictly construe the language of a will to prevent the unconscionable exercise of a power of appointment away from children and in favor of a charity.

The Executor of the estate of Philip Dreyfus, for the first time on May 27, 1968, admits in writing that the estate of Philip Dreyfus "is insolvent" and that the bequest to Philip's children could not be paid / Article Fourth of the will of Philip (Appendix "A" pp. 3 and 4) gives and devises "all the rest, residue and remainder of my estate remaining after carrying out the foregoing provisions of this, my Last Will and Testament." The words, "remaining after carrying out the foregoing provisions," should be given their fair and rightful meaning. A federal court should strictly construe the language of the fourth paragraph of the will of Philip Dreyfus in favor of his children, to prevent the "unconscionable exercise" of his power of appointment in favor of a charity.

5. An agreement against public policy is void and

should not be made valid simply by court acceptance of an affidavit that such an agreement existed.

The alleged agreement (Appendix "A" p. 5) between The First National Bank, as Executor and Trustee, and Michael Reese Hospital to transfer trust assets in consideration for the assumption by the hospital of the duty of the Bank Executor and Trustee "to pay claims, taxes and administrative expenses," is contrary to public policy and therefore void. *Jefferson Storage Corporation v. Kessler*, 125 Fed.2d 108, 110 (1941).

CONCLUSION

We respectfully submit that the Writ of Certiorari should issue.

Respectfully submitted,

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SEVENTH CIRCUIT DECISION OF APRIL 27, 1970

In the United States Court of Appeals for the Seventh Circuit.

September Term, 1969 - April Session, 1970.

No. 17474.

PHYLLIS S. DREYFUS and DIANE E. DREYFUS, *Plaintiffs-Appellants*, *v.* THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Philip S. Dreyfus Trust created under the Will of Moise Dreyfus, Deceased, of August 1, 1935, and known as Trust No. 33705; THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Philip S. Dreyfus Trust dated August 5, 1935 and known as Trust No. 33703; and THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Carolyn S. Dreyfus Trust, dated December 29, 1937, and known as Trust No. 33704; and MICHAEL REESE HOSPITAL AND MEDICAL CENTER, a Not-for-Profit Corporation, *Defendants-Appellees*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 27, 1970

Before KNOCH, *Senior Circuit Judge*, and CUMMINGS and KERNER, *Circuit Judges*.

KNOCH, *Senior Circuit Judge*. The plaintiffs-appellants, Phyllis S. Dreyfus and Diane E. Dreyfus, filed their Complaint

in the United States District Court claiming the principal of the three trusts here involved, under the Will of their late father Philip Dreyfus who died January 19, 1961.

The defendant-appellee, The First National Bank of Chicago, was trustee under Trusts numbered 33703, 33704 and 33705. The principal has been distributed to the defendant-appellee Michael Reese Hospital and Medical Center.

Trust 33703 was created by the father of the plaintiffs, Philip Dreyfus, as donor, on August 5, 1935, as an irrevocable trust for the benefit of himself and his descendants. On October 25, 1955, Philip and his wife Dorris Roberts Dreyfus were divorced. Plaintiffs allege in their Complaint that the proceedings were attended with bitterness between the parties. The plaintiffs were then twelve and nine years of age. On March 3, 1959, Philip Dreyfus, their father, amended Trust 33703 to provide for payment of $200 per month for the use and benefit of his daughters. These payments were made until his death on January 19, 1961.

Trust 33704 was also an irrevocable trust set up by Carolyn Dreyfus, Philip's mother, on December 29, 1937, for the benefit of Philip and his descendants.

Trust 33705 was a testamentary trust established under the Will, dated August 1, 1935, of Moise Dreyfus, father of Philip and grandfather of the plaintiffs.

Basically all three trust instruments provide that following the death of Philip the principal is to be distributed as he shall appoint by will and, in default of appointment, to his then living issue.

Philip's Will is dated November 10, 1958. The Divorce Decree and a subsequent Order were exhibits in other proceedings, portions of which were included in the Appendix

to this appeal. These documents indicate that at the date of the Will the plaintiffs, then minor children of fifteen and twelve years were residing with their mother in California contrary to the provisions of the Divorce Decree which awarded custody to their father.

The pertinent portions of Philip's Will appear in the Complaint as follows:

> First: I direct that all of my just debts and funeral expenses be paid as soon after my death as conveniently may be.
>
> Second: I give and bequeath all of my clothes, jewelry, personal effects and automobiles and accessories which I may own at the date of my death, share and share alike to such of my nephew Martin Raymond Rosenthal, and my niece, Louise Dorothy Rosenthal, as shall survive me.
>
> Third: Having in mind the children of my former marriage, and intending to limit my testamentary provision for them to that stated in this paragraph, I do give and bequeath the sum of One Thousand Dollars ($1,000.00) to my daughter, Phyllis S. Dreyfus, if she shall survive me, and I do give and bequeath the sum of One Thousand Dollars ($1,000.00) to my daughter, Diane E. Dreyfus, if she shall survive me.
>
> Fourth: All the rest, residue and remainder of my estate remaining after carrying out the foregoing provisions of this, my Last Will and Testament, of every kind, nature and sort whatsoever, real and personal, legal and equitable, and wheresoever situated, which I may own, possess, hold, be seized of or entitled to at the date of my death, together with the rents, income, profits,

interest and increment thereof and which may arise or accrue therefrom, and including lapsed bequests, and including, without limitation, all properties over which I may have a power of appointment (and I do expressly intend hereby to exercise all powers of appointment which I may have at the time of my death), after deducting therefrom claims, administration expenses (including Executor's and Attorneys' fees) and all taxes whatever, I give, devise and bequeath unto Michael Reese Hospital of Chicago, an Illinois corporation not for profit, having its principal office in Chicago, Illinois, to be used by it for research purposes; and I do express my desire that Michael Reese Hospital of Chicago shall use my said bequest, to the maximum extent deemed proper by it, for the payment of salaries and other compensations to persons employed by it in the pursuit of medical research.

Count I of the Complaint is based on the theory that the wording in the Fourth article of the Will:

> All the rest, residue and remainder of my estate remaining *after carrying out the foregoing provisions* of this, my Last Will and Testament . . . (emphasis added)

provides a condition precedent to the exercise of the power of appointment. The Complaint asserts that the bequest of $1000 to each of the plaintiffs is one of those foregoing provisions and that it cannot be carried out because, apart from the corpus of the trusts, Philip's estate is now insolvent, a fact which plaintiffs did not learn until they received a letter to that effect, dated May 27, 1968, from The First National Bank.

Thus plaintiffs argue that the monetary legacies cannot be paid, the "foregoing provisions" cannot be carried out, and no property passes under the Fourth article of the Will; there is a default of appointment for each of the trusts and the principal passes to Philip's lawful surviving issue.

This result, as the District Judge held, would be contrary to the manifest intent of the testator set out in the Third article of his Will expressly limiting testamentary provision for plaintiffs to $2000.

To act on plaintiffs' theory would require the Court to accept plaintiffs' rather strained interpretation of the Executor's Inventory in the Probate Court proceedings, an exhibit in the District Court case, which shows Trust 33703 as an asset. Plaintiffs argue that the trusts cannot pay their bequests nor can the Probate Court authorize such payment because legacies are not claims, taxes or administrative expenses, and the trusts (and the claim scheduled in the inventory) refer only to an agreement to pay claims, taxes and administrative expenses. However, the record includes an affidavit of the Director of Michael Reese indicating that in accepting the principal of Trust 33703, Michael Reese agreed to pay claims, debts and expenses arising out of Philip's probate estate to the extent that the trust would have been obligated but specifically stating that:

> In keeping with the foregoing Michael Reese expressly represents that it will cause to be paid all monetary bequests contained in the will of Philip S. Dreyfus.

We find untenable the plaintiffs' theory that by this action Michael Reese is circumventing the provisions of their father's Will.

A will must be construed to achieve the intent of the testator. *Rosenthal v. First National Bank,* (Phyllis S. Dreyfus, et al., appellants) 1968, 40 Ill.2d 266, 276, 239 N.E.2d 826, 831. *Baum v. Continental Illinois National Bank,* 7 Cir., 1956, 230 F.2d 377, 381 and cases there cited.

Plaintiffs argue that the "conditions" set out in the Fourth article should be "strictly enforced" to avoid the "unconscionable exercise" of the power. But the testator obviously intended that "unconscionable exercise." It was his clear purpose to limit testamentary provision for his daughters to $1000 each. We agree that:

> The cardinal rule of testamentary construction is to ascertain the intention of the testator from an examination of the will as a whole and to give effect thereto unless such intent is contrary to law or public policy. *Marshall v. Northern Trust Co.,* 1961, 22 Ill.2d 391, 394, 176 N.E.2d 807, 809, and cases there cited.

In effect plaintiffs do contend that this Will violates public policy in their Count III by reference to the Probate Code of the State of California, where plaintiffs are residents, which limits to one-third of the estate the amount a testator may bequeath to charity in preference to his spouse, descendants or ancestors. Philip Dreyfus was a resident and domiciliary of Illinois. His Will has been admitted to probate there. His estate is being administered there. The trusts were held by an Illinois trustee. The charity to which he appointed them is an Illinois charity. The California statutes do not affect testamentary succession of non-California personal property of non-Californians. *Schultz v. Chicago City Bank and Trust Co.,* 1943, 384 Ill. 148, 51 N.E.2d 140. See also

In re Layton's Estate, 1933, 217 Calif. 451, 19 P.2d 793, 798-799, construing the predecessor to this statute as limited in the case of non-California residents to property within the State of California. No such prohibitory limitation exists in Illinois law or public policy.

The obvious intent of the testator was that the monetary disposition of the earlier articles should be paid out of the trusts if his other assets proved insufficient. We cannot agree that it was his intent to have his exercise of all his powers of appointment nullified and his expressed wish that the residue of his estate, including all property over which he had a power of appointment, go to Michael Reese, be frustrated rather than invade the trust assets of approximately $2 million to pay specific bequests of $2000.

Although proceedings are still pending on the Estate of Philip Dreyfus in the Probate Court, plaintiffs assert that the question of the insolvency of the estate is an issue before this Court as it has been asserted in their affidavit (supported by the Executor's letter to that effect) and uncontradicted by any counteraffidavit. We cannot agree that the summary judgment of dismissal entered by the District Court was therefore rendered improper.

Count II alleged that the purported exercise of the power of appointment failed because of the limitation of the power to use in religious, charitable, literary or educational purposes, whereas Philip's Will speaks of use for research, and, further, that the Charter of Michael Reese did not authorize research. The District Court adopted the findings of the Court in *Michael Reese Hospital and Medical Center v. The Mutual Life Insurance Company*, No. 65 C 1490, wherein analysis of Michael Reese's Charter showed its purpose to cure and prevent sickness and

disease of which purpose medical research was an intrinsic part. Plaintiffs have not argued this point in their brief.

In Count IV, plaintiffs asserted a claim to savings bonds in the amount of $150,000 allegedly converted by Philip Dreyfus. The executor of the Estate is not a party. Plaintiffs pray that if the powers of appointment are held to have been effectively exercised, then the principal of Trust 33703, first, and then that of 33705 and 33704, in turn, be charged with the sum due plaintiffs for these bonds. Noting that a claim for approximately the same sum was pending in the Probate Court, the District Judge abstained from taking jurisdiction. Plaintiffs argue that a Court having once assumed jurisdiction should grant full relief and that this is a case where justice dictates that the District Court should assume jurisdiction, citing *Markham v. Allen* (on which defendants also rely, among other cases) 1946, 326 U.S. 490, 494, where the Supreme Court in reversing a Court of Appeals decision that the District Court was without jurisdiction in the matter, said that federal courts do have jurisdiction to entertain suits in favor of creditors, legatees, heirs and other claimants against an estate to establish their claims so long as the Federal Court did not interfere with probate proceedings. We are satisfied, however, that no abuse of discretion has occurred in this case where the District Court merely abstained from assuming jurisdiction over a matter already pending in a state court.

The District Judge decided that the claims asserted against Trust 33705 were also barred on the ground of *res judicata, Marie-Louise Rosenthal,* appellee v. *The First National Bank of Chicago,* as Trustee, et al. (Phyllis S. Dreyfus, et al., appellants) 40 Ill.2d 266, 239 N.E.2d 826,

which affirmed the Illinois Appellate Court's decision reported at 88 Ill.App.2d 82, 232 N.E.2d 265, directing distribution of Trust 33705 to Michael Reese. While the plaintiff in that case was Philip's sister, the plaintiffs here filed an answer, counterclaim and motion for summary judgment in that case. The basis for their claim was that Philip predeceased his mother Carolyn and therefore could not make an effective exercise of the power of appointment. This was an *in rem* action and defendants contend that it was incumbent on plaintiffs to present all their claims and legal theories at that time. Plaintiffs, as indicated, reply that they learned of the insolvency of their father's Estate too late to assert the theory on which they now contend that the apparent exercise of the power was ineffective.

Plaintiffs also contend that *res judicata* is not applicable because the parties differ. But plaintiffs and Michael Reese were parties and the issue of the distribution of the *res* was involved in both these actions, including the issue of the effectiveness of Philip's exercise of the powers of appointment. Newly discovered evidence has been held not to prevent the application of *res judicata, People ex rel. Endicott v. Prather,* 1931, 343 Ill. 443, 447, 175 N.E. 658, and it is no objection that the former action included parties not joined in the present action, or vice versa, so long as the judgment was rendered on the merits, the cause of action was the same and the party against whom the doctrine is asserted was a party to the former litigation. *Hummel v. Equitable Life Assur. Soc.*, 7 Cir., 1945, 151 F.2d 994, 996. In view of our conclusions stated above, we will not discuss this aspect of the case in detail, but we find no error in the District Court's ruling on this point.

We have carefully considered all other points and authorities cited by the plaintiffs but find them unpersuasive. The

judgment of the District Court is affirmed.

AFFIRMED.

ORDER DENYING PETITION FOR REHEARING

United States Court of Appeals for the Seventh Circuit

[Thursday, May 14, 1970]

Before

Hon. Win G. Knoch, Sr. Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Otto Kerner, Circuit Judge

* * (Caption No. 17474) * *

IT IS ORDERED by the Court that the petition for rehearing filed in this appeal be and the same is hereby denied.

IT IS FURTHER ORDERED that the printed opinion filed and issued herein on April 27, 1970 be corrected to eliminate the word "irrevocable" from the second and third lines of the third paragraph on page 2.*

*As presently constituted in Appendix "A" herein, this reference is to the second full paragraph on page 2, line 2.

NOTICE OF APPEAL DATED JANUARY 10, 1969

In the United States District Court for the Northern District of Illinois, Eastern Division.

No. 68 C 1833

PHYLLIS S. DREYFUS and DIANE E. DREYFUS, *Plaintiffs, vs.* THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Philip S. Dreyfus Trust created under the Will of Moise Dreyfus, Deceased, of August 1, 1935, and known as Trust No. 33705; THE FIRST NATIONAL BANK OF CHICAGO as Trustee of the Philip S. Dreyfus Trust dated August 5, 1935, and known as Trust No. 33703; and THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Carolyn S. Dreyfus Trust, dated December 29, 1937, and known as Trust No. 33704; and MICHAEL REESE HOSPITAL AND MEDICAL CENTER, a Not-for-Profit Corporation, *Defendants.*

Notice Is Hereby Given that Phyllis S. Dreyfus and Diane E. Dreyfus, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final Order entered in this action on the 10th day of January, 1969.

/s/ Samuel M. Lanoff,
Samuel M. Lanoff,

/s/ John A. Cook,
John A. Cook,

c/o Morgan, Halligan, Lanoff & Cook
Suite 944
33 South Clark Street
Chicago, Illinois 60603
Attorneys for Phyllis S. Dreyfus and Diane E. Dreyfus, Plaintiffs.

UNITED STATES DISTRICT COURT - FINAL ORDER

* * (Caption 68-C-1833) * *

The matter coming on to be heard on motion of defendants to dismiss the action, or in the alternative, to stay proceedings, and the parties having filed memoranda of law, and the Court having read into the Record its opinion, which opinion is to stand as any requisite findings of fact and conclusions of law, it is hereby Ordered, Adjudged and Decreed, that

The motion of the defendants is granted and the Complaint and the various claims asserted therein are dismissed, said dismissal to be with prejudice as to Counts I-III of the Complaint, but said dismissal shall not be an adjudication on the merits with respect to the claims asserted in Count IV of the Complaint, and defendants to recover their costs herein.

Entered:

James B. Parsons,
United States District Judge

Date: January 10, 1969.

PROOF OF SERVICE BY MAIL

STATE OF ILLINOIS)
) ss.
County of Cook)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Cook, State of Illinois, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is One First National Plaza, Chicago, Illinois, that on JULY , 1970, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT (Oct. Term, 1970 - No. .....) on the following named party by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Chicago, Illinois, addressed to said party at the address as follows:

MR. GEORGE V. BOBRINSKOY, JR.,
MAYER, FRIEDLICH, SPIES, TIERNEY,
BROWN & PLATT,
SUITE 1955,
231 SOUTH LaSALLE STREET,
CHICAGO, ILLINOIS 60604.

I further state that instructions have been given to the printers--Dean-Standefer Co., 315 Third Street, Huntington Beach, California--to forward direct to the Clerk of the United States Supreme Court 40 copies of the aforesaid document, the original of which will be deposited in the United States Post Office in the City of Chicago, Illinois, by the undersigned, addressed to the Clerk of the United States Supreme Court, Washington, D. C. 20543.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY , 1970, at CHICAGO, ILLINOIS.

Subscribed and sworn to before me
this day of JULY, 1970.

Notary Public in and for the
County of Cook, State of Illinois.

SUPREME COURT, U. S.

No. 468

AUG 19 1970

E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

PHYLLIS S. DREYFUS and DIANE E. DREYFUS, Petitioners,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Philip S. Dreyfus Trust created under the Will of Moise Dreyfus, Deceased, of August 1, 1935 and known as Trust No. 33705; THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Philip S. Dreyfus Trust dated August 5, 1935 and known as Trust No. 33703; and THE FIRST NATIONAL BANK OF CHICAGO, as Trustee of the Carolyn S. Dreyfus Trust, dated December 29, 1937, and known as Trust No. 33704; and MICHAEL REESE HOSPITAL AND MEDICAL CENTER, a Not-for-Profit Corporation, Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

Of Counsel:
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STate 2-0600

GEORGE V. BOBRINSKOY, JR.
BURTON E. GLAZOV
Attorneys for Respondents, The First National Bank of Chicago, as Trustee of the Philip S. Dreyfus Trust created under the Will of Moise Dreyfus, Deceased, of August 1, 1935, and known as Trust No. 33705; The First National Bank of Chicago, as Trustee of the Philip S. Dreyfus Trust dated August 5, 1935 and known as Trust No. 33703; and The First National Bank of Chicago, as Trustee of the Carolyn S. Dreyfus Trust, dated December 29, 1937, and known as Trust No. 33704; and Michael Reese Hospital and Medical Center, a Not-for-Profit Corporation.

McCORMICK & HENDERSON, CHICAGO

In the Supreme Court of the United States

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BRIEF FOR RESPONDENTS IN OPPOSITION

The Petition for Certiorari should be denied. This action, a purported will construction proceeding, was initiated by Petitioners for the clear purpose of setting aside the will of their father which appoints various trusts, over which he possessed a testamentary power of appointment, to Michael Reese Hospital, (hereinafter "Michael Reese"), rather than to his estranged daughters, the Petitioners. No substantial issues are presented and the decisions below are manifestly correct.

QUESTIONS PRESENTED

1. Where an alleged constitutional issue was neither raised nor passed upon by the courts below, will the Supreme Court accept the issue for review?

2. Does the carrying out of a testator's intention to benefit a charity, rather than his heirs, raise a constitutional issue?

STATEMENT OF THE CASE

Philip Dreyfus died in 1961 possessed of testamentary powers of appointment over the three trusts here in issue. In his will he provided $1000 bequests for each of his daughters, and left the residue of his estate, including all property over which he might have a power of appointment, to Michael Reese.

The effectiveness of Philip Dreyfus' exercise of his testamentary power of appointment over a testamentary trust created by his father Moise Dreyfus was determined adversely to Petitioners in proceedings in the Illinois Courts, *Rosenthal* v. *First National Bank of Chicago*, 40 Ill.2d 266, 239 N.E.2d 826 (1968).

Following the decision of the Illinois Supreme Court, Petitioners commenced the present action in the District Court for the Northern District of Illinois raising new theories and laying claim to two trusts in addition to the testamentary trust at issue in the *Rosenthal* proceeding. Petitioners' principal contention was as follows. Although Philip's will expressly stated his intention to limit his testamentary provision for Phyllis and Diane to $1,000 each, and expressly appointed to Michael Reese all properties over which he had a power of appointment, they alleged an inability of Philip's estate to pay the $1,000 legacy

to each of them,* that a "default of appointment" thereby resulted and that as takers in default of appointment they were entitled to the three trusts.

In the District Court Michael Reese filed a motion to dismiss for failure to state a claim upon which relief could be granted and upon the grounds that the prior Illinois state court litigation was *res judicata* with respect to the testamentary trust created by Philip's father.

The District Court granted the motion to dismiss and the Court of Appeals affirmed, holding that, under the Illinois law (Philip Dreyfus died a domiciliary of Illinois), a testator has the right to appoint to whomsoever he desires and that it would be contrary to Philip's manifest intent to construe his exercise of the power of appointment to be conditional upon payment of the $1,000 legacies to Petitioners.

While in the complaint Phyllis and Diane asserted that their rights to equal protection of the law would somehow be infringed if a California statutory provision limiting gifts to charities were not applied to prevent this Illinois testator's bequest to a charity from being carried out, the issue was expressly abandoned before the Court of Appeals and is not the purported constitutional question which forms the basis for the Petition for Certiorari.

The claim that it is "unconscionable", and therefore unconstitutional, for a testator to prefer a charity rather than his heirs was not raised in either the District Court or the Court of Appeals.

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* The full amount of the bequests to Petitioners have been tendered to them but such tender has been refused.

ARGUMENT

I. The Procedural Issues Petitioners Seek to Raise are Without Merit.

As their first reason for granting the writ Petitioners state that it was procedural error for the District Court to have dismissed the complaint prior to trial. This procedural claim has no merit.

A will must be allowed to speak for itself and there was no ambiguity whatever in Philip's will insofar as Petitioners were concerned. There were no disputed factual issues as to which a trial was required. From the four corners of the will (and this is explicitly recognized in the several grounds urged for granting the writ which belabor Philip's "unconscionable" act in appointing the trusts to Michael Reese rather than to them) it was clear that Petitioners' "construction" of Philip's will was not colorable and was in fact directly contrary to the terms of the will. No factual issues have been suggested or alleged at any stage of this proceeding which would call this conclusion into question.

II. Petitioners, Having Failed to Present Their Purported Constitutional Question to the Courts Below, May Not Assert it in This Court.

Even assuming that Petitioners' claim that judicial sanction of a testator's intention to favor a charity, rather than his children, raises a constitutional issue of equal protection of the laws under the Fourteenth Amendment (which it most clearly does not) the question is not properly raised in this Court. Petitioners did not present that issue to the courts below and under this Court's well settled rulings,

may not present it, for the first time, for consideration by this Court. *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16 (1958); *California* v. *Taylor*, 353 U.S. 553, 557 n. 2 (1957).

III. Giving Effect to a Testator's Intention to Favor a Charity Rather than his Heirs Raises No Constitutional Question and Does Not Merit Review by the Supreme Court.

Petitioners' basic premise is that federal courts, on constitutional grounds, should not enforce "unconscionable provisions" in wills. While Petitioners expound upon so-called "unconscionable acts" throughout their Petition, it is not until the next to last page (Petn., p. 8) that they finally describe the act itself which supposedly violates their rights to equal protection of the laws. The so-called "unconscionable act" is merely a testator's exercise of a power of appointment in favor of a charity instead of in favor of his two estranged daughters. Since the desire to dispose of one's property to a charity is in no way unconscionable, (in fact has been usually considered laudatory), Petitioners' entire premise, upon which their constitutional theory is constructed, is faulty.

While couching their theory in constitutional terms, Petitioners' real desire is to ask this Court, in the guise of will construction, to reject on vague grounds of "unfairness" the clear directives of the testator.

In point of fact, Petitioners are asking this Court to overturn a fundamental principle of the Common Law, incorporated into the Illinois law of testamentary disposition, and in its place to create a federal constitutional law of probate which would hold that, under the Fourteenth Amendment, a person may not give his property to a charity—but must give it to his heirs. There exists no author-

ity or principle of public policy to support such a position. Its lack of merit is reflected in Petitioners' failure to raise it at any stage of the proceedings below.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE V. BOBRINSKOY, JR.
BURTON E. GLAZOV
Attorneys for The First National Bank of Chicago, as Trustee of the Philip S. Dreyfus Trust, created under the Will of Moise Dreyfus, Deceased of August 1, 1935, and known as Trust No. 33705; The First National Bank of Chicago, as Trustee of the Philip S. Dreyfus Trust dated August 5, 1935 and known as Trust No. 33703; and The First National Bank of Chicago, as Trustee of the Carolyn S. Dreyfus Trust, dated December 29, 1937, and known as Trust No. 33704; and Michael Reese Hospital and Medical Center, a Not-for-Profit Corporation, *Respondents.*

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Supreme Court of the United States

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Respondents.

REPLY BRIEF OF PETITIONERS

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Respondents

REPLY BRIEF OF PETITIONERS

There are statements made outside the record and contrary to the record which impel this short reply.

1. Under argument at Part II of the Brief in Opposition, the respondents assert that the constitutional question was not raised in the courts below. Respondents are in pos-

session of the records in the court below, are familiar with that record, and have wrongfully attempted to disqualify petitioners' right of appeal to this Honorable Court. The Court's attention is respectfully directed to the Appendix of the United States Court of Appeals (a certified copy of which is filed concurrently herewith). Therein, the constitutional issue of due process and equal protection of the law is set forth not only in the original complaint at page 6C, pages 17, 18 and 20 but in

Response of Plaintiffs to Motion to Dismiss And Stay Proceedings (Appendix, page 67):

"D. Where due process or equal protection of the law are in issue, res judicata is not applicable."

Affidavit of Phyllis S. Dreyfus (Appendix, page 70):

"That the plaintiffs as the only children of Philip Dreyfus would be denied the equal protection and due process of law guaranteed to them by the Fourteenth Amendment of the Constitution of the United States and against public policy if a power of appointment is recognized which allows the Dreyfus trusts established for the benefit of Philip and his descendants to be completely exhausted to charity."

In the United States Court of Appeals briefs, petitioners cited on the constitutional question *Shelby v. Kraemer*, 334 U.S. 1, 20, 22; *Jones v. Mayer* (U. S. Supreme Court) 20 L.Ed.2d 1189; and *Truax v. Raich*, 239 U.S. 33.

2. Under Argument III, page 5, respondents refer to petitioners as "estranged" and set forth the following conclusion:

> "Since the desire to dispose of one's property to a charity is in no way unconscionable (in fact has been usually considered laudatory) petitioners' entire premise, upon which their constitutional theory is constructed, is faulty."

The attempt to benefit a charity to the detriment of minor children cannot be considered "laudatory" but should be condemned as "unconscionable" by this Court. At the date of the will of Philip Dreyfus, Diane Dreyfus was 12 years of age and Phyllis Dreyfus was 15 years of age. At the time of his death both were minors under Illinois and California law (14 years and 17 years respectively). To say that these children were "estranged" is vindictive and wrong.

3. Under the stated terms of Philip's will, and as his only heirs-at-law, petitioners are in a priority position to that of the stranger-hospital as residuary legatee. It is inconceivable, at law, that the hospital was able to replace the Executor, without court appointment, and, without court order, obtain distribution of all of the assets of Philip Dreyfus valued at $2,500,000 prior to the settlement of the probate proceedings.

Deprived of due process and protection of the law, the testator's daughters have been forced to look to an adverse legatee, not only for payment (in its discretion) of their legacies and claims but as to their rights of inheritance.

The Bank, as Trustee and Executor, had a duty to carry out the provisions of Philip Dreyfus' will (Appendix A[1], page 3) in the order designated. By failing to do so, the Bank as Trustee and Executor stands in breach of its fiduciary capacity and the hospital stands in unlawful possession of the assets of the estate and trusts of Philip Dreyfus.

CONCLUSION

Petitioners are properly before this Court. As minors and wards of the Probate Court of the State of California, they were entitled to extraordinary consideration by the courts of Illinois. The record is clear that they have been denied their rights of due process and equal protection under the law guaranteed to them by the United States Constitution.

Respectfully submitted,

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1 Appendix A to Petition for Writ of Certiorari.